

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
(Docket No. 08-1293)**

In the Application of:)	
)	
Wang et al.)	
)	Group Art Unit: 2419
Serial No. 10/702,152)	
)	Examiner: Pezzlo, John
Filed: November 5, 2003)	
)	Confirmation No. 7812
For: METHOD OF AND APPARATUS FOR)	
VARIABLE LENGTH DATA PACKET)	
TRANSMISSION WITH)	
CONFIGURABLE ADAPTIVE)	
OUTPUT SCHEDULING ENABLING)	
TRANSMISSION ON THE SAME))	
TRANSMISSION LINK(S) OF)	
DIFFERENTIATED SERVICES FOR)	
VARIOUS TYPES OF TRAFFIC)	

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Dear Sir:

Applicant requests reconsideration of the patent term adjustment in light of the recent *Wyeth v. Dudas* decision (D.D.C., Memorandum Opinion for Case No. 07-1492, Sept. 30, 2008). Based on a September 29, 2009 issuance date, Applicant submits the B delay is 655 days. After taking overlap into account, Applicant requests the Patent Term Adjustment be **1,260** days total.

Applicant authorizes the Office to charge any underpayment or credit any overpayment related to this request to Deposit Account No. 132490.

A. Definition of A Delay and B Delay

According to *Wyeth*, there are three guarantees of patent term under 35 U.S.C. § 154(b). The first, termed “A delay”, are extensions due to delays by the PTO beyond statutory deadlines, such as fourteen months for a first response on the merits, four months to issue an office action

after a response, and four months to issue a patent after the fee is paid. *Wyeth*, p. 3. The second, termed “B delay”, is a “a one-day term extension [that] is granted for every day greater than three years after the filing date that it takes for the patent to issue, **regardless of whether the delay is the fault of the PTO**” *Id.* (emphasis added). The third, termed “C delays”, concerning delays due to interferences, secrecy delays and appeals was not substantively addressed by *Wyeth*. *Id.*

35 U.S.C. § 154 also reduces patent term adjustment due to delays by the applicant for the period of time where an applicant failed to engage in reasonable efforts to conclude prosecution of the application. 35 U.S.C. § 154(b)(2)(C)(i). Specifically, the statute defines failing to engage in reasonable efforts to conclude prosecution for any periods of time “in excess of 3 months that are taken to respond to a notice from the Office making any rejection, objection, argument, or other request, measuring such 3-month period from the date the notice was given or mailed to the applicant.” 35 U.S.C. § 154(b)(2)(C)(ii). For purposes of this request, “A delay” includes reduction in patent term due to delays by the Applicant.

B. Application Summary

The total patent term adjustment indicated on the Determination of Patent Term Adjustment for this application is 949 days. Key dates in this application are in the table below.

Date	Activity	A Delay	B Delay	Applicant Delay
November 5, 2003	Application Filed			
January 5, 2005	14 Month Anniversary of Filing Date	+		
November 5, 2006	3-Year Anniversary of Filing Date	+	+	
August 3, 2007	Non-Final Rejection Mailed	+	+	
November 3, 2007	Three-Month for Applicant Response		+	+
January 2, 2008	Applicant Response Filed		+	+
May 2, 2008	Four-Month Date for Office Response	+	+	
June 12, 2008	Second Applicant Response Filed	+	+	
July 14, 2008	First Notice of Allowance (NOA) Mailed	+	+	
August 21, 2008	First Request for Continued Examination (RCE)/ Information Disclosure Statement (IDS) Filed		+	
October 17, 2008	Second NOA Mailed			
January 17, 2009	Three-Month Date for Applicant Response			+
January 21, 2009	Second RCE/IDS Filed			+
March 4, 2009	Notice of Non-Responsive Amendment Filed			
March 23, 2009	Responsive Amendment Filed			
May 14, 2009	Third NOA Mailed			
August 14, 2009	Issue Fee Paid			

A “+” in the A Delay, B Delay, or Applicant Delay column in the table above indicates the Applicant believes the respective delay accrues between consecutive dates with “+” signs. For example, as shown in the table above, Applicant believes that A delay was accrued between January 5, 2005 and August 3, 2007.

C. A Delay and Applicant Delay

For the “A delay” and Applicant Delay calculations, the Patent Term Adjustments (PTA) on PAIR for this application indicate a total of “A delay” minus Applicant delay of 949 days.

The “Second Applicant Response” filed on June 12, 2008 mentioned in the table above is part of the Image File Wrapper on PAIR. However, Applicant’s review of the PTA calculation on PAIR does not show a patent term adjustment record for the Second Applicant Response. Under Applicant’s duty of candor to the Office, Applicant requests the Office re-review the PTA calculation regarding the PTA calculation for the Second Applicant Response as part of this petition.

In the remainder of this petition, Applicant assumes that the PTA determination on PAIR for a total of A delay minus Applicant delay of 949 days is correct.

D. B Delay Calculation

The instant application was filed on November 5, 2003. The three year anniversary of this filing date is November 5, 2006. Therefore, Applicant submits the B delay period or “B period” is the time from the day after the 3 year anniversary (November 5, 2006) until either a patent issues, an RCE is filed, or for other reasons that are not applicable to this application (*e.g.*, interferences and Applicant-requested delays). *See* 35 U.S.C. § 154(b)(1). Specifically, the First RCE was filed for the instant application on August 21, 2008. Applicant therefore submits the B delay period is the time from November 5, 2006 to August 21, 2008 for a total of 655 days.

E. Estimated Patent Term Adjustment

The *Wyeth* decision states that “the ‘A period’ and ‘B period’ overlap only if they occur on the same calendar day or days.” *Wyeth*, p. 8. Thus, according to the *Wyeth* decision, Patentees are entitled to both the “A delay” and the actual “B delay” minus any overlap which occurs on the same calendar days. There is an overlap of 344 days between the A delay and the B delay during the intervals between November 5, 2006 and August 3, 2007 (271 days) and between May 2, 2008 and July 14, 2008 (73 days). Thus, the total Patent Term Adjustment due to both the “A” and “B” delays minus the overlap and Applicant Delay is $949 + 655 - 344 =$ 1,260 days. For these reasons, Applicant submits that the estimated Patent Term Adjustment for this case **should be increased from 949 days to 1,260 days.**

In light of the foregoing, Applicant respectfully requests that the Patent Term Adjustment be adjusted as indicated above. If a telephone conference would expedite the prosecution of this Request for Reconsideration of Patent Term Adjustment, please contact the undersigned.

Respectfully submitted,

**McDonnell Boehnen
Hulbert & Berghoff LLP**

Date: October 13, 2009

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